Supreme Court, U.S.
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Case No. 99-502

In the
United States Supreme Court

DONALD E. NELSON,
Petitioner,

v.

ADAMS USA, INC.
AND
APEHEAD MANUFACTURING, INC.
Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Federal Circuit

PETITIONER'S REPLY TO RESPONDENTS' BRIEF IN OPPOSITION

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REASONS FOR GRANTING THE WRIT

I.

This Court Should Grant Certiorari so that it Can Delineate the Limits that the United States Constitution Places Upon the Liberal Amendment and Joinder Provisions of the Federal Rules of Civil Procedure.

Petitioner here challenges the power of the district court to amend a judgment to include a non-party as a judgment debtor, without first following the procedural requirements for joinder set forth in the Federal Rules of Civil Procedure. In reply, respondents argue at page 12 of their Brief in Opposition that petitioner, despite the fact that he never was served with process, was not a "non-party" because he had been "made a party." True, the district court granted respondents' motion for leave to amend to join petitioner as a party. However, respondents never followed the rules that set forth the procedure for joining a party once such leave has been granted. Those rules and the due process clause of the Fourteenth Amendment to the United States Constitution required respondents to file, and serve a third party complaint upon, petitioner. Their failure to do so is fatal to their right to have judgment rendered against him.

Regrettably, after having failed to follow the requirements of the federal rules and the due process clause, respondents now point to an alleged failure on the part of petitioner to raise the "due process" argument before the district court and the court of appeals. However, on account of respondents' deliberate and un-excused failure to follow the rules and due process requirements for joining a party to litigation, petitioner was ***not***, as respondents claim, a party. Therefore, as a non-party, he had neither the duty, nor the opportunity, to raise lack of due process as a defense. Nevertheless, despite the fact that petitioner never was afforded the opportunity to raise the due process defense, by way of filing an answer or pre-answer motion to a properly filed third party complaint, he did raise, both before the district court and the court of appeals, the issue of lack of

notice – an issue that goes to the heart of due process. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950).

Not only did petitioner raise the due process issue, but also Federal Circuit Judge Newman, in her dissent to the decision below, addressed it length. Judge Newman wrote:

> The fundamentals of due process are notice and the opportunity to defend against the noticed liability * * *. Omitting the person to be charged until after judgment has been entered can not circumvent these fundamental principles.

[April 26, 1999 Decision and Opinion of the United States Court of Appeals for the Federal Circuit at p. 35 of the Appendix to Petitioner's Petition for Writ of Certiorari].

Based upon Judge Newman's lengthy dissent regarding due process, there is no basis to respondents' objection that petitioner failed to raise the issue in the courts below. Accordingly, this Court should grant the instant Petition for Writ of Certiorari.

Respondents next argue that the alleged "appearance" of petitioner, ***after*** judgment had been rendered against him, waived his right to assert his claim that he never was served with process. Contrary to respondents' argument, however, it is well settled that a person's mere appearance in an action (especially when the person has not yet properly been joined as a party) does not waive that person's right to raise the defense of lack of personal jurisdiction. *Orange Theatre Corp. v. Rayherstz Amusement Corp.*, 139 F.2d 871(3rd Cir. 1944), *cert. den. sub nom., Orange Theatre Group v. Brandt*, 322 U.S.744 (1944). In the instant case, petitioner's ***post-judgment*** appearance could not conceivably have waived his defenses of lack of personal jurisdiction and lack of service of process. As of the date of petitioner's post-judgment appearance, there having been neither the filing nor the service of a third party complaint, no answer or responsive motion was due, and therefore, petitioner had neither any obligation (under Fed. R. Civ. P. 12), nor any ability, to raise the service and jurisdictional defenses. Fed. R. Civ. P. 12 provides the exclusive means by which a party may raise

defenses such as lack of personal jurisdiction and service of process. Because respondents disregarded the Federal Rules of Civil Procedure and neither filed nor served a third party complaint upon petitioner, he never had the opportunity to assert, under Fed. R. Civ. P. 12, the defenses that respondents now claim he has waived. Thus, no question exists that the procedure utilized by the district court and respondents to join petitioner as a party was seriously flawed and, to rectify this flaw, the Court should review this case.

Respondents also argue in their Brief in Opposition that the issue of petitioner's liability was thoroughly litigated by his corporation, Ohio Cellular Products, and therefore, because he was in "privity" with Ohio Cellular Products (by virtue of the fact that he "controlled the litigation"), he is "collaterally estopped" from relitigating the issue of his personal liability. [Respondents' Brief in Opposition at p. 18]. However, petitioner's collateral estoppel argument clearly is misplaced because this Court expressly rejected the precise same argument in *Zenith Corp. v. Hazeltine*, 395 U.S. 100 (1969). In *Zenith Corp.*, the district court, in rendering judgment against a corporation, HRI, included the corporation's owner, Hazeltine, in the judgment, because, among other reasons, one of Hazeltine's officers, Dodds, allegedly "controlled the litigation." This Court, in affirming the court of appeals' reversal of that judgment, rejected the district court's reasoning and held:

> Likewise, were it shown that Hazeltine through its officer, Dodds, in fact controlled the litigation on behalf of HRI, and if the claim were made that the judgment against HRI would be res judicata against Hazeltine because of this control, ***that claim itself could be finally adjudicated against Hazeltine only in a court with jurisdiction over that company.***

Zenith Corp., 395 U.S. at 111 [emphasis added].

Thus, although collateral estoppel and its close cousin, res judicata, ***may*** be legitimate issues because of alleged privity between petitioner and Ohio Cellular Products, those issues may be adjudicated against petitioner ***only in a court that has obtained jurisdiction over him by valid service of process.*** *Id.*, at 110. Because the

district court ***never*** obtained service of process over petitioner, the collateral estoppel issue that respondents now have raised remains to be litigated. Accordingly, this court should accept review of this case so that it can reaffirm the principles of its decision in *Zenith Corp*. Otherwise, a substantial departure from that decision will be allowed to stand.

Finally, respondents argue that it was proper for the district court to hold petitioner personally accountable under traditional tort principles of vicarious liability. [Respondents' Brief in Opposition at p. 15]. Petitioner agrees with the general applicability of tort principles to the attorneys' fees issue in this case. Unfortunately, the district court did not hear this case, at least against petitioner, as a typical tort case. Had the district court heard and conducted this case as a typical tort liability case, petitioner would have had the opportunity, as would any tort defendant, to defend, on the merits, the issue of whether he should be vicariously liable for the conduct of his corporation, Ohio Cellular Products. The district court simply ignored this step, which is crucial in any tort litigation, and entered judgment against petitioner under a theory of vicarious liability when there were triable issues of fact and defenses to be raised under Fed. R. Civ. P. 12.

No question exists that the manner in which the district court rendered judgment against petitioner has grave consequences for any claim involving vicarious liability that should come before the federal courts. Based upon the Federal Circuit Court of Appeals' affirmance of the district court's finding of vicarious liability, any plaintiff in a federal court action can circumvent litigation of vicarious liability issues (such as *respondeat superior*), by simply proceeding to judgment against one party then, as respondents did in the instant case, amending that judgment to include the party's principal without giving that principal the opportunity to defend, on the merits, his or her liability. Given the fact that, in the instant case, the Federal Circuit Court of Appeals established a precedent that could have potentially disastrous consequences on future tort litigation in the federal court system, this Court should exercise its supervisory power and review the court of appeals' decision. By doing such, this Court can ensure that, in the future, issues involving vicarious liability, where they are disputed as they are in the instant case, are decided on the merits ***before judgment*** and not by means of post-judgment amendments.

CONCLUSION

For the foregoing reasons, petitioner respectfully requests that this Court grant certiorari.

Respectfully submitted,

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